

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 North Capitol Street, NE, Suite 9100
Washington, DC 20002-4210

DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS
Petitioner,

v.

NB HOLDING CO., INC.
Respondent.

Case No.: CR-I-07-W700006

FINAL ORDER

I. Introduction

This case arises under the Civil Infractions Act of 1985, as amended (D.C. Code, 2001 Ed. §§ 2-1801.01 - 2-1802.05) (“Act”). On June 18, 2007, the Government served a Notice of Infraction (“NOI”) on Respondent, NB Holding Co., Inc., charging it with violating D.C. Code, 2001 Ed. § 37-201.32a (“Statute”) by operating a weighing or measuring device without payment of the registration fee.¹ The NOI alleged that the violation occurred on June 5, 2007, at 5301 Wisconsin Avenue, N.W., (“Property”) and sought a fine of \$2,000.

¹ D.C. Code, 2001 Ed. does not contain a § 37-201.32a. However, D.C. Code, 2001 Ed. § 37-201.32 provides in part:

Any person violating any of the provisions of this subchapter shall be punished by a fine not to exceed \$ 500, or by both such fine and imprisonment not to exceed 6 months. ... Civil fines, penalties, and fees may be imposed as alternative sanctions for any infraction of the provisions of this subchapter, or any rules or regulations issued under the authority of this subchapter, pursuant to Chapter 18 of Title 2. Adjudication of any infraction of this subchapter shall be pursuant to Chapter 18 of Title 2.

On June 18, 2007, Respondent filed an answer with a plea of Admit with Explanation, which it supplemented on July 11, 2007, with a letter of explanation from John R. Strojny, President. In his letter, Mr. Strojny explained that in January 2007, Respondent began the process of renewing its registration and paying all fees and taxes due. Respondent continued through July 2007, trying to complete all the forms and pay all of the fees required by the Government, including the Department of Consumer and Regulatory Affairs and Office of Tax and Revenue. As of July 11, 2007, Respondent was continuing to struggle with the Government bureaucracies as it tried to comply with the applicable regulatory scheme.

On July 23, 2007, this administrative court issued its order affording the Government fourteen days to reply to Respondent's Admit with Explanation. The Government did not file a response.

II. Discussion

In this case the Government has charged Respondent with violating D.C. Code, 2001 Ed. § 37-201.32a by operating a weighing or measuring device without payment of the registration fee; however, the District of Code, 2001 Ed. does not contain any provision that corresponds to this citation. Further, assuming the Government intended to cite D.C. Code § 37-201.32, that provision merely authorizes sanctions for violating other provisions of Title 37. It imposes no duty to pay registration fees (or any other duty) that, if violated, could support liability under the Act.

The Act requires a Notice of Infraction to contain, among other things, a "citation of the law or regulation alleged to have been violated". D.C. Code, 2001 Ed. § 2-1802.01. Simply put, an agency seeking to penalize a party for a statutory or regulatory violation must inform that

party of an existing statute or regulation allegedly violated (and capable of being violated) as well as the underlying facts that constitute the alleged violation.

In *DOH v. Smith*, No I-00-40049, Off. Adj. Hear, Lexis *37 at 6, Final Order (August 31, 2001) this administrative court ruled:

The Civil Infractions Act of 1985 and the Due Process Clause of the Fifth Amendment require that respondents be provided with full and fair notice of any charges brought against them and a reasonable opportunity to prepare a defense. *E.g.*, D.C. Code § 6-2711(b); The Government cannot rely (as it has here) on a catchall regulation with a general cross-reference to literally hundreds of regulations in DCMR Title 12. It must timely provide Respondent with fair notice of exactly which provisions of law form the underlying basis for the charge n7. Because the Government did not provide such notice, this charge must be dismissed. (citations omitted)

In this case, the Government charged Respondent with violating D.C. Code, 2001 Ed. § 37-201.32a; however, the Code does not include this section in Title 37. In effect, the NOI charged the Respondent with violating a statute that does not exist. Compounding the problem, Section 37-201.32 simply authorizes sanctions for violating other provisions not cited in the NOI.

The Government's failure to identify a statute or regulation that it alleges the Respondent violated, renders the Notice of Infraction defective on its face. *In re Morrell*, 859 A.2d 644, 648 n.5 (D.C. 2004) (document is "defective on its face" when, assuming as true all facts it alleges, it is insufficient as a matter of law to support the requested relief). As the Notice of Infraction is defective on its face, I must dismiss the charges in this case, even though the Respondent pleaded Admit with Explanation to the charge. *See* D.C. Code § 2-1802.01(b)(3) ("If an administrative law judge . . . determines that a notice of infraction is defective on its face, the administrative law judge . . . *shall* enter an order dismissing the notice of infraction . . .") (emphasis supplied).

Accordingly, it is, this 23rd day of October 2007

ORDERED, that Respondent's alleged violation of D.C. Code, 2001 Ed. § 37-201.32a as asserted in the NOI is **DISMISSED WITH PREJUDICE** due to the Government's failure to accurately cite the statute or regulation that the Government contends the Respondent violated; and it is further

ORDERED, that the appeal rights of any person aggrieved by this Order are stated below.

October 23, 2007

_____/SS/
Jesse P. Goode
Administrative Law Judge